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No. 99-1407

In the

Supreme Court of the United States

FRANK'S CASING CREW & RENTAL TOOLS, INC.,

Petitioner,

-versus-

MARINE DRILLING MANAGEMENT CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

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Although the reasons which we believe warrant the granting of FRANK'S Petition for a Writ of Certiorari are thoroughly set forth in the Petition, we believe a Reply Brief is helpful to correct several contentions contained in the Brief in Opposition filed by MARINE DRILLING MANAGEMENT COMPANY ("MARINE").

I. **The Fifth Circuit's lack of jurisdiction when it decided this case below**

In its Petition, FRANK'S submitted that the Fifth Circuit lacked jurisdiction over the instant case as MARINE did not timely appeal.[1]

In response, MARINE contended that an interlocutory appeal in an admiralty case was permissive and not mandatory.[2]

FRANK'S, United States law and the Fifth Circuit's *Hamilton* decision disagree.[3]

28 U.S.C. 1292(a) lists various interlocutory orders that are immediately appealable. The statute provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve

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[1] FRANK'S Petition, pp. 6-8.

[2] MARINE's Opposition Brief, p. 3. MARINE makes a point of stating FRANK'S did not contest the jurisdiction of the lower courts in its Statement of Jurisdiction and instead raised this point in its Argument, implying this issue was raised incorrectly. MARINE misreads Supreme Court Rule 14 if indeed this is its position. Rule 14(1)(e) sets forth the requirements for the Statement of Jurisdiction and essentially requires the Petitioner to set forth the "basis for jurisdiction in this [i.e., the United States Supreme] Court." Thus, it would have been inappropriate for FRANK'S to address the Fifth Circuit's lack of jurisdiction in this section.

[3] *Hamilton Plaintiffs v. Williams Plaintiffs, 147 F.3d 367 (5th Cir. 1998).*

> or modify injunctions, except where a direct review may be had in the Supreme Court;
> * * *
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to **admiralty cases** in which appeals from final decrees are allowed.[4]

Section 1292(a) must be read in conjunction with 28 U.S.C. 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A). Section 2107 provides, in pertinent part:

> . . . (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review **unless notice of appeal is filed within thirty days after the entry of such judgment, order or decree.**[5]

Rule 4(a)(1)(A) provides :

> . . . (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk **within 30 days after the judgment or order appealed from is entered.**[6]

Under the clear language of the statutes, these provisions provide that a notice of appeal must be filed within thirty days after the entry **of the judgment, order or decree being appealed**. In the present case, the order being appealed is the interlocutory decree of the district court granting

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[4] 28 U.S.C. 1292(a). Emphasis added

[5] Emphasis added.

[6] Emphasis added

FRANK'S Motion for Summary Judgment, which order was entered on September 22, 1997. Thus, the notice of appeal in the present case should, under the language of these statutes, have been filed within thirty days of that ruling.[7]

The cases cited by MARINE in support of its claim that an interlocutory appeal is permissive and not mandatory were decided in the 1960's and 1970's when §2107 provided as follows:

> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

Prior §2107 provided different deadlines depending on whether the decree being appealed was a final decision or an interlocutory decree, and the difference between those time periods varied greatly such that a notice of appeal had to be filed within only fifteen days after entry of an interlocutory decree. Fifteen days is an extremely short period of time to have to file a notice of appeal or lose the right to do so. Undoubtedly, this provision was often overlooked, the consequence of which presumably led to inequitable results on occasion but for the courts' intervention. FRANK'S believes the decisions cited by MARINE from the 1960's and 1970's, while §2107 contained this burdensome procedural requirement, may have been motivated by the inequitable results foisted on parties due to the statute.

This burdensome fifteen day rule for interlocutory decrees was deleted from §2107 in 1991. The current provision does not distinguish between final and interlocutory decrees and provides that the notice of appeal must be filed within thirty days of entry of judgment, a more manageable period of time. Due to this revision, FRANK'S submits that this interpretation, i.e., that an appeal from an interlocutory decree is permissive, is no longer warranted. Indeed, MARINE has cited no cases rendered since the revision to

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[7] This statutory interpretation does not promote piecemeal appeals as in most cases an appeal is not being taken from an interlocutory decree but rather a final judgment.

§2107 in support of its position. Alternatively, even if these decisions are still valid and effective, they are decisions of lower courts and are consequently not binding on this Honorable Court.

FRANK'S stands by the arguments made in its Petition[8] wherein it discussed the cases of *David Graves George v. Victor Talking Machine Co.*[9] and *Hamilton v. Williams,*[10] which arguments will not be rehashed herein. MARINE's dismissal of those cases on the ground that they involve an injunction is insufficient. Interlocutory orders involving injunctions are dealt with in §1292(a)(1), the same section of the same statute in which interlocutory decrees involving admiralty cases are addressed. Indeed, section (a) is written so that after the introductory sentence, there is a list of three types of interlocutory orders that qualify under this section. Injunctions and admiralty cases are two of the items listed. Consequently, appeals of interlocutory decrees in admiralty cases should be treated no differently from appeals of interlocutory decrees involving injunctions.

As the *Hamilton v. Williams* case was decided by the Fifth Circuit, the very circuit that decided all but one of the cases cited by MARINE in support of its claim, after those decisions, it is apparent the Fifth Circuit has changed its mind on the issue of whether interlocutory appeals are permissive or mandatory, likely in light of the change to §2107.

FRANK'S further wishes to clarify the ruling in the *Hamilton* case. FRANK'S agrees with MARINE that the issue in *Hamilton* was whether the September 26, 1996 order or the April 1, 1997 order was the dispositive order. The court found the September 26, 1996 order to be the dispositive order, dissolving the injunctive relief by vacating the population cap consent decrees for the parish facilities.[11] The April 1, 1997 order finally released all state facilities. The court thus found the September 26th order to be the dispositive order at issue, that it was appealable under §1292(a)(1)[12] and

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[8] FRANK'S Petition, pp. 6-8.

[9] *David Graves George v. Victor Talking Machine Co., 293 U.S. 377, 55 S.Ct. 229, 79 L.Ed 649 (1933).*

[10] *Hamilton Plaintiffs v. Williams Plaintiffs, 147 F.3d 367 (5th Cir. 1998).*

[11] *Hamilton, 147 F.3d at 370.*

[12] As acknowledged by MARINE. MARINE's Opposition Brief, p. 1, n. 18.

that the *Hamilton* plaintiffs did not timely appeal this order.[13] The September order was final only in the sense that it dissolved the injunctive relief immediately. Execution was not delayed for the April 1, 1997 order, which simply released the state facilities, much like the final judgment in the present case simply released the remainder of the parties. In the present case, the dispositive order at issue was the September 22, 1997 ruling. Consequently, under §1292(a)(3), §2107, Rule 4(a)(1)(A) and *Hamilton v. Williams*, the Fifth Circuit lacked jurisdiction in the present case at the time it entered its decision, and, under *George v. Victor*, its opinion should be reversed.[14]

II. The granting of FRANK'S Petition for Writ of Certiorari under Rule 10

MARINE contended that "FRANK'S does not cite one single reason under Rule 10 why this case is worthy of review by the United States Supreme Court."[15] FRANK'S did explain, in great detail, why this case is worthy of review by the United States Supreme Court. FRANK'S will not review all of the arguments made in its Petition again. Nevertheless, FRANK'S feels compelled to at least address this allegation, albeit briefly.

Supreme Court Rule 10 provides the considerations governing review on certiorari. It provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, **although neither controlling nor fully measuring the Court's discretion**, indicate the character of the reasons the Court considers:

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[13] *Hamilton, 147 F.3d at 370-71.*

[14] MARINE infers that the lack of jurisdiction issue should have been raised at oral argument before the Fifth Circuit. MARINE's Opposition Brief, p. 4. As discussed in FRANK'S Petition, defects in jurisdiction cannot be waived. FRANK'S Petition, pp. 6-7.

[15] MARINE's Opposition Brief, p. 13.

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far deported from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> * * *
> (c) **a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court**, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
> . . . .[16]

MARINE selectively read Rule 10. It cited the language of the rule on review of a writ of certiorari being a matter of judicial discretion,[17] but ignored other portions of the rule.

Although conveniently omitted by MARINE, Rule 10 itself indicates that the considerations listed therein governing review on certiorari are "neither controlling nor fully measuring the Court's discretion." Thus, even if FRANK'S had not explained in its Petition why certiorari should be granted, which it did as discussed below, this omission alone would not mandate the denial of FRANK'S Petition.

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[16] Supreme Court Rule 10. Emphasis added.

[17] MARINE's Opposition Brief, p. 11.

In its Opposition, MARINE reviewed section (a) of Rule 10 only. FRANK'S never pretended to be asserting any portion of Rule 10(a) as the basis for the granting of its Petition. Rather, FRANK'S asserted as the basis for granting its Petition that

> the United States Supreme Court has not addressed whether the prohibition of §905(b) extends to additional assured coverage obligations and whether those obligations can stand where there is no consideration through direct payment, any ongoing relationship between the parties or even a valid reciprocal indemnity obligation, much less where the contract was obtained by a vessel in a superior bargaining position. FRANK'S submits that this is an important question of federal law that has not been but should be settled by the United States Supreme Court, thus warranting the granting of FRANK'S Petition for Writ of Certiorari."[18]

FRANK'S clearly invoked and satisfied Rule 10(c).

III. FRANK'S did not waive any of the arguments raised in its Petition for Writ of Certiori

MARINE claims that FRANK'S has raised new, previously undiscussed, issues before the Supreme Court and that by failing to raise these arguments at the appellate level, those arguments have been waived. In support of this argument, MARINE does not cite United States Supreme Court cases wherein this Honorable Court refused to hear issues not raised below but rather cites two Fifth Circuit cases.[19] FRANK'S did not raise any new issues in its Petition, and even if it had, its Petition involves purely legal issues, a well recognized exception to the waiver rule, as discussed below.

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[18] FRANK'S Petition, p. 29.

[19] *Goldin v. Bartholow, 166 F.3d 710 (5th Cir. 1999); Applewhite v. Reichhold Chemicals, Inc., 67 F.3d 571 (5th Cir. 1995).*

From the beginning, 33 U.S.C. 905(b) and *Voisin*[20] have been at the heart of the indemnity and additional assured issues. Indeed, a cursory review of the record in this case reveals they are cited repeatedly in the pleadings involving these issues. The intent behind and the policies underlying §905(b) and *Voisin* are integral to interpreting same. They are not new issues. FRANK'S has simply delved deeper into existing issues and tailored its arguments to its audience, the United States Supreme Court.

MARINE contended that FRANK'S is asking this Honorable Court to overrule the Fifth and Ninth Circuits' decisions in *Voisin* and *Price v. Zim.*[21] Without restating FRANK'S entire Petition, FRANK'S has always argued that *Voisin* was distinguishable on several grounds from this litigation and that thereby the limited prohibition did not apply. It is important to note that the *Voisin* court found no violation of the policies underlying §905(b) under the facts in that case. It is obvious then that when those policies are violated, as here, it is §905(b) which prohibits even the additional assured obligation. FRANK'S position in this respect has remained consistent throughout. FRANK'S has further pointed out that the Fifth Circuit's decision extended *Voisin* so far in the present case, that its decision conflicts with the policies underlying the enactment of §905(b) and renders Congress' attempt, through §905(b), to overrule *Ryan*[22] null.

While discussing the policies underlying §905(b) and *Voisin* and the distinctions between *Voisin* and the present case, FRANK'S pointed out a number of errors made by the courts in those decisions. However, FRANK'S nowhere asked this Honorable Court to overrule those decisions. Indeed, FRANK'S specifically passed on that issue. In its brief, FRANK'S wrote "pretermiting whether the *Voisin* decision was correct in doing so, the extension of the *Voisin* exception in this case where 1) there was no consideration and no opportunity for the employer to pass the cost onto the vessel; and 2) Shell chartered the Marine 200, required FRANK'S to

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[20] *Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d 1174 (5th Cir. 1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1057, 84 L.Ed.2d 820 (1985).*

[21] *Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422 (9th Cir. 1980).*

[22] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed 133 (1956)..*

work aboard it and to gain passage MARINE forced FRANK'S to sign the MSA, is clearly inappropriate, abrogating Congressional intent."[23] As discussed at length in its Petition, FRANK'S position is that *Voisin* provided an extremely limited jurisprudential exception to the double liability prohibition of §905(b) and that extension of the *Voisin* decision in the present case, which case is far removed from *Voisin*, does violence to the intent behind and policies underlying §905(b). However, if this Honorable Court chooses to overrule *Voisin* and *Price*, it is certainly free to do so.

Alternatively, even if FRANK'S raised a new issue by arguing that the Fifth Circuit violated the intent behind and the policies underlying §905(b), thereby rendering Congress' attempt, through §905(b), to overrule *Ryan* null, by once again requiring an LHWCA employer to bear the full burden of liability of the vessel owner in addition to its own liability for LHWCA benefits, this argument is a purely legal argument and is an exception to the waiver rule cited by MARINE.

MARINE cited two cases in support of its claim that FRANK'S has waived any argument it might have regarding the policies underlying and the intent behind §905(b) and its relationship to *Voisin* in the present case.[24] MARINE neglected to mention the exceptions to the waiver rule. It is true that as a general rule, an appellate court will not consider an issue raised for the first time on appeal. Although stated slightly differently by the varying circuits, the Ninth Circuit has most clearly and succinctly set forth the three exceptions to this rule.[25] They are: (1) the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial system; (2) when a new issue arises while appeal is pending because of a change in the law; or (3) **when the issue presented is purely one of law**

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[23] FRANK'S Petition, p. 17

[24] MARINE cites *Goldin v. Bartholow, 166 F.3d 710 (5th Cir. 1999)* and *Applewhite v. Reichhold Chemicals, Inc., 67 F.3d 571 (5th Cir. 1995)* for the proposition that failure to brief and argue an issue constitutes waiver.

[25] MARINE has not cited any authority out of this Honorable Court indicating this rule applies to the Supreme Court when considering a Petition for Writ of Certiorari. Nevertheless, if this appellate court rule is to apply to the United States Supreme Court, then surely the appellate court exceptions must also.

and either does not depend on the factual record developed below or the pertinent record has been fully developed.[26]

FRANK'S Petition raised purely legal issues. There are no factual disputes as the parties agreed on the facts below. Indeed, FRANK'S Petition arose out of a Motion for Summary Judgment which involved only legal issues at the district court level.

The policy behind the general rule of not considering issues raised for the first time on appeal appears to be to prevent an ambush.[27] In the present case, the arguments raised by FRANK'S in its Petition come as no surprise to MARINE. These arguments underlay the arguments made throughout. No ambush is at hand.

FRANK'S commends its full memorandum to the attention of this Honorable Court. For the foregoing reasons, as well as those which have been urged in FRANK'S Petition, certiorari should be granted.

Respectfully submitted,
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[26] *Bolker v. C.I.R., 760 F.2d 1039, 1942 (9th Cir. 1985).* Emphasis added. The Fifth Circuit has also acknowledged an exception for legal issues. --*F.D.I.C. v. Lee, 130 F.3d 1139, 1141 (5th Cir. 1997)* ("While it is the settled law of our circuit that the district court should have the first opportunity to address all of the issues contained in the appeal, this usually controlling precept has less force when the case turns on a statutory point of law subject to our *de novo* review and there are no countervailing reasons warranting remand to the district court."); *First United Financial Corp. v. Speciality Oil Co., Inc., 5 F.3d 944, 948 (5th Cir. 1993)* ("An issue raised for the first time on appeal generally is not considered unless it involves a purely legal question or failure to consider it would result in a miscarriage of justice."); *U.S. for use of Wallace v. Flintco, Inc., 143 F.3d 955, 971 (5th Cir. 1998)* ("This Court generally refuses to consider issues not raised below unless the issue presents a pure question of law or an issue which, if ignored, would result in a miscarriage of justice.").

[27] *F.D.I.C. v. Laguarta, 939 F.2d 1231, 1240 (5th Cir. 1991)* where the Court refused to hear record-based arguments where the parties were not afforded an opportunity to develop the record below and the issues were not implicit or included in the issues previously raised, "so that the party was not on notice of the need to meet it, and the record [was] not . . . adequately developed in that respect."